majority of the Advisory Committee, recommends that the Commission require broadcasters to provide free time to national and local candidates for candidate-centered discourse, at least one minute in duration, with the candidate appearing in no less than half of the segment. *See Advisory Committee Report,* Separate Statement of Benton *et al.* at 70. This free time would be available 60 days before a general election, and could be limited by a "time bank" or "voucher" model. *See Advisory Committee Report,* Separate Statement of Benton *et al.* at 70-71. Another worthwhile proposal highlighted by the NOI is the Petition for Rulemaking filed by Henry Geller *et al.* *See NOI* at ¶ 38. UCC *et al.* support these proposals, as well as any other, that provide mandatory and meaningful free time for candidate-centered discourse.

2. Voluntary efforts are insufficient to further these values.

A reasonable amount of mandatory political free time is also necessary because voluntary efforts are insufficient. The majority of broadcasters have not provided free time in the past. As noted in the NOI, "many television broadcasters are providing scant coverage of local public affairs, and what coverage there is may be shrinking." *NOI* at ¶ 36.

Studies confirm this trend. One survey by the Center for Media and Public Affairs found that coverage of political campaigns by TV network news declined forty-four percent in fall 1999, compared with the same 1995 period. *See* COMM. DAILY (Jan. 24, 2000). A recent study conducted by the Alliance for Better Campaigns estimates that despite competitive races in both major parties, the major networks aired just 34 seconds of candidate discourse each night during the month of January. *See* Alliance for Better Campaigns, *Network Viewers Get Fleeting Glimpses of Presidential Hopefuls, Study Finds*, <http://www.bettercampaigns.org/documents/rele022300.htm> (last visited Mar. 13, 2000). Thus, relying on the largesse of

broadcasters will not serve the public interest and the Commission should require broadcasters to offer free time to political candidates.

D. The Commission Should Expand Accessibility Requirements to Ensure that All People Have Access to Public Interest Programming.

In addition to seeking comment on whether free time for political candidates should be required, the NOI also asks whether more extensive minimum accessibility requirements should be imposed on digital television broadcasters. *See NOI* at ¶ 26. UCC *et al.* recommend that the Commission should expand closed captioning requirements to encompass all public interest programming and that the FCC phase-in video description requirements for digital licensees.

The NOI requests comment on whether different requirements with regard to closed captioning should be imposed on DTV broadcasters. *See NOI* at ¶ 26.[19] The Advisory Committee suggested that broadcasters expand captioning on Public Service Announcements (PSAs),[20] public affairs programming, and political programming. *See Advisory Committee Report* at 62.

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[19] Present regulations require broadcasters to caption 100% of "new" television programming by January 1, 2006, and 75% of "pre-rule" programming by January 1, 2008. *See* 47 C.F.R. § 79.1(b). Programs formatted for display on digital television are considered "pre-rule" programming, until the regulations requiring digital television receivers to be equipped with decoder circuitry designed to display closed captioning go into effect. *See* 47 C.F.R. § 79.1(a)(6). When those regulations go into effect all subsequent programming formatted for display on digital television will be considered "new" television programming. *See id.*

[20] Under current rules, PSAs of ten minutes or less are specifically exempt from closed captioning requirements. *See* 47 C.F.R. § 79.1(d)(6). Because PSAs are short and have a high repeat value, the cost of captioning would be small related to the benefit of allowing deaf and hard of hearing individuals to receive these important announcements.

UCC *et al.* agree with the Advisory Committee that these types of public interest programming should be made accessible to persons with disabilities. Indeed, the Commission should require that all public interest programming required by the FCC be made accessible. For example, if the Commission requires digital broadcasters to provide three hours of locally originated programming, as we propose, it should further require that this programming be captioned so that it is accessible to all Americans, including those who are deaf or hearing hearing. Under the current rules, however, some of this programming could fall under the exemption for locally produced non-news programming with limited repeat value. *See* 47 C.F.R. § 79.1(d)(8). The Commission must either rescind this exemption or clarify that it does not apply to the required three hours of local programming. To exempt local programming from closed captioning requirements would frustrate the goal of "provid[ing] persons with hearing disabilities with the same opportunities to share in the benefits provided by television programming that is available to others." *See* Closed Captioning and Video Description of Video Programming, *Report and Order*, 13 FCC Rcd 3272, 3277(1997) ("*Video Programming Order*").[21]

The Commission should also take steps to ensure access for the blind. The NOI requests comment on how to encourage DTV broadcasters to take advantage of the enhanced capabilities of digital technology to provide video description. *See NOI* at ¶ 27. The Advisory Committee

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[21] Likewise, any free time for political candidates should be captioned. Arguably, such programming might fall under the exemptions for advertising under five minutes or PSAs of ten minutes or less. *See* 47 C.F.R. §§ 79.1(a)(1), 79.1(d)(6). The Commission should clarify that any free time for political candidates does not fall into one of these exemptions. Failure to do so would exclude the deaf and hard of hearing from an important element of the political process.

recommended that DTV broadcasters allocate sufficient bandwidth for the transmission and delivery of video description. *See Advisory Committee Report* at 62. UCC *et al.* agree that digital broadcasters should be required to set aside a portion of their bandwidth for the purpose of providing video description.[22] One of the advantages of digital television is its ability to include video description in one of the multiple audio channels that are part of the digital bandwidth. *See Advisory Committee Report* at 62. However, unless a sufficient portion of that bandwidth is set aside for video description, digital television programming may develop to the exclusion of blind individuals. Broadcasters would then be required to retrofit their systems to include room for video description, which would be much more costly. *Cf.* Karen Peltz Strauss and Robert E. Richardson, *Breaking Down the Telephone Barrier - Relay Services on the Line*, 64 TEMP. L. REV. 583 (1991) (discussing the social and monetary costs of retrofitting the telephone system to be more accessible for the hearing and speech impaired). Thus, it is vital that the Commission require a portion of the audio channels be set aside for the purpose of including video description.

E. The Commission Should Strengthen Minimum EEO Recruitment and Reporting Requirements for DTV Broadcasters.

Another minimum obligation intrinsic to the public interest standard is a broadcaster's responsibility to cast as wide and diverse a net as possible in its employment recruiting efforts. *Review of the Commission's Equal Employment Opportunity Rules and Policies and Termination*

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[22]Analog broadcasters currently broadcast video description on the Secondary Audio Programming ("SAP") channel. *See* Implementation of Video Description of Video Programming, MM Docket No. 99-339, *Notice of Proposed Rulemaking*, FCC 99-353 at ¶ 10 (rel. Nov.18, 1999).

of the EEO Streamlining Proceeding, MM Dkt. No. 98-206, FCC 00-20 at ¶ 3-4 (rel. Feb. 2, 2000) ("*EEO Order*"). To this end, the NOI asks how the Commission should "encourage diversity in broadcasting consistent with relevant constitutional standards." *NOI* at ¶ 33. Recently, the Commission released an order revamping its EEO Rules and Policies. *See generally EEO Order*. The transition to digital in no way lessens a licensee's equal employment obligations.

In fact, in light of DTV's new opportunities, the Commission and the industry should explore new ways to address the paucity of minorities and women in the broadcast industry. *See Advisory Committee Report* at 63-64. One way the Commission could improve a DTV licensee's outreach and recruitment efforts is to require licensees to broadcast on-air notifications of vacancies. With the increased capacity of DTV, this requirement should not be burdensome. Another way to improve efforts would be to ask licensees to use DTV's interactive capacity to assist the public in finding out about vacancies and to electronically file their EEO reports with the Commission.

F. The Commission Should Require All DTV Broadcasters to Maintain Meaningful and Detailed Periodic Reports of Their Public Interest Programming and File them Electronically with the Commission.

Minimum public interest requirements should be complemented by an effective monitoring system. Public disclosure is an essential element in ensuring that broadcasters meet their minimum public interest obligations. The NOI asks what types of information about programs and other activities broadcasters should be required to disclose to the public. *See NOI* at ¶ 16. The Advisory Committee recommended that broadcasters be required to identify and describe their local public interest programming, when it was aired, and how the programming

fulfills their responsibility to meet the local informational and educational needs of their communities. *See Advisory Committee Report* at 45.

UCC *et al.* agree with the Advisory Committee that public disclosure should be required. Substantive disclosure requirements promote public awareness of a broadcaster's compliance, or noncompliance, with its requisite duty to serve the community. To this end, UCC *et al.* propose that the FCC require broadcasters to file detailed periodic reports documenting their compliance with their minimum public interest obligations.[23]

The NOI also asks how broadcasters could use the Internet to be more responsive to the needs of the public. *See NOI* at ¶ 17. Public disclosure is essential to the relationship between broadcasters and their communities, and the FCC should update current regulations to reflect digital technology's potential to improve these relations. The Advisory Committee recommended that broadcasters be required to electronically file periodic reports. *See Advisory Committee Report* at 45. One broadcaster sitting on the Advisory Committee recommended that the Commission require all broadcasters to post these reports on the licensee's web site and broadcast them over the air. *See Advisory Committee Report*, Separate Statement of James Goodmon at 87.

The FCC should adopt these recommendations. The current rules allowing licensees to maintain public inspection files on computers and encouraging them to post them on their web

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[23] Current regulations, including maintaining quarterly issues and program lists in a public file, do not adequately describe programming, nor the quantity provided, nor how that programming is meeting public interest obligations. *See* 47 C.F.R. § 73.3526(e)(11)(i). As a result of the current rules, a community cannot sufficiently hold broadcasters accountable for satisfying their public interest obligations to their communities, the very reason for receiving the broadcast license in the first place.

sites are insufficient. It is relatively simple and inexpensive for the FCC to require a digital licensee to post these files on their web sites.[24] This simple procedure would make the public inspection files more easily accessible. The Commission should also post a link to the filed reports on its own web site. In addition, the Commission should require broadcasters to regularly broadcast on-air notifications of the contents of the quarterly reports and where they can be obtained.

Quarterly filing, Internet posting and on-air notification requirements would all have to be met as a condition of the broadcaster's license renewal. Strong public disclosure regulations will better enable the public to determine if broadcasters are meeting their obligations to serve their communities, as well as encourage licensees to follow these rules. As the Advisory Committee stated, "[g]reater availability of relevant information will increase awareness and promote continuing dialogue between digital television broadcasters and their communities and provide an important self-audit to the broadcasters." *Advisory Committee Report* at 46.

III. THE COMMISSION SHOULD ADOPT A RANGE OF ADDITIONAL PUBLIC INTEREST OBLIGATION OPTIONS THAT GIVE DTV BROADCASTERS FLEXIBILITY TO USE THE ENHANCED CAPABILITIES OF MULTICASTING IN A MANNER THAT BEST SERVES THEIR COMMUNITIES.

As discussed above, minimum public interest requirements should apply to all DTV broadcasters, regardless of how they use the spectrum. In light of DTV's new capabilities, however, the Commission should adopt additional public interest obligations commensurate with how a broadcaster decides to use the digital spectrum. The NOI asks how public interest

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[24] Broadcasters are already required to post their public EEO file on their website. *EEO Order* at ¶ 124.

obligations apply to a digital broadcaster who chooses to multicast. *See NOI* at ¶ 11. UCC *et al.* agree with the gravamen of the Advisory Committee's conclusion that a DTV broadcaster that multicasts incurs additional public interest obligations, but should have the flexibility to choose from a range of options to satisfy its enhanced public interest requirements. As discussed below, we propose that a digital licensee can satisfy its additional public interest obligations by either providing additional public interest programming, leasing a portion of its spectrum to an independent voice, or paying a fee to a fund that supports noncommercial programming.

A. Because the Current Regulatory Regime is Based on the Assumption that a Licensee Will Only Provide One Channel, the Commission Must Update Public Interest Obligations to Reflect Multicasting.

Existing public interest obligations were developed under the analog system, and are therefore shaped by the inherent limitations in that technology. *See Fourth Further Notice of Proposed Rulemaking/Third Notice of Inquiry*, 10 FCC Rcd 10541,10546 (1995); *Fifth Report and Order*, 12 FCC Rcd at 12829. The current rules, based on the assumption that a licensee provides a single channel of programming, will not satisfy the public's needs in the digital environment. The Commission has a duty to formulate and revise its public interest policies to reflect changed circumstances in the digital era. *See CBS v. DNC*, 412 U.S. at 118 ("[the FCC] must adjust and readjust the regulatory mechanisms to meet changing problems and needs"); *accord Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 394 (1969). In light of DTV's new capacity to serve communities in ways unimaginable in the era of analog,[25] the Commission should require broadcasters to take advantage of these new capabilities in serving the public

[25] *See Fifth Report and Order*, 12 FCC Rcd at 12828 (recognizing that digital technology requires re-conceptualization of public interest obligations in light of new capabilities).

interest.[26]

The Advisory Committee proposed that since broadcasters who choose to multicast may reap enhanced economic benefits, they "should have the flexibility to choose between paying a fee, providing a multicasted channel for public interest purposes, or making an in-kind contribution." *Advisory Committee Report* at 54.[27] UCC *et al.* agree with the Advisory Committee recommendation that DTV broadcasters who multicast should have flexibility to choose among a variety of options to serve the public interest.

UCC *et al.* propose that a DTV broadcaster choosing to multicast be given three options to satisfy its additional obligations: (1) provide more noncommercial, public interest programming; (2) lease a portion of its spectrum to either a small disadvantaged business or a noncommercial educational programmer; or (3) pay a fee to a fund that supports local noncommercial programming. This range of options, discussed below, enables the broadcaster to choose what is best suited for its community of service.

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[26] While the Advisory Committee also suggests that these new obligations would not apply to digital broadcasters until they reached a specified revenue level, eleven members disagreed: "Additional public service obligations should be commensurate with these additional benefits, and should not be conditioned on whether those services generate a predetermined amount of revenue or profit." *Advisory Committee Report,* Separate Statement of Benton *et al.* at 73. Moreover, the eleven members concluded that consideration of revenues is "unwarranted in light of the fact that broadcasters have been given multiple billions of dollars worth of public airwaves, at no cost, to convert to digital TV." *Id.* at 74. UCC *et al.* urge the Commission to adopt the approach advocated in the Separate Statement of Benton *et al.*

[27] The Advisory Committee recommended charging a fee to multicasting broadcasters that would support noncommercial programming. If a broadcaster did not want to pay that fee, it could opt to either provide a specified amount of noncommercial, public interest programming or to lease a portion of its spectrum to a noncommercial programmer. *See Advisory Committee Report* at 54-55.

B. Broadcasters Should Have the Option of Satisfying Additional Public Interest Obligations by Dedicating a Portion of their Spectrum to Public Interest Programming.

The Commission should give broadcasters the option to provide additional programming that serves the public interest. The type of programming that would qualify could be defined broadly to include news, discussions of public affairs, programming related to political campaigns or ballot issues, locally oriented or originated programming, programming for underserved communities, educational or informational programming, and children's educational programming.[28]

A broadcaster would have two alternatives under this option: (1) it could dedicate one channel to public interest programming that would be available to the public for free; or (2) it could elect to air one hour of additional public interest programming on any of its free channels for every five hours of multicasted programming.[29] If a broadcaster chooses the second alternative, it would have to air the public interest programming on a free channel at times when a reasonable audience would be available, *e.g.*, between 7:00 a.m. and midnight.

The option of providing additional public interest programming is flexible on several levels. It permits a broadcaster to determine the needs of its community and what type of programming would best serve its viewers. For example, a broadcaster could provide an amalgam of local, children's educational, and political programming, or it could dedicate an

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[28] Although all such programming need not be noncommercial, the Commission should take steps to encourage the provision of noncommercial programming.

[29] This is the equivalent of 20% of total programming and is consistent with the option of dedicating one of five multicasted channels to public interest programming.

entire channel to one of these types of programming. Broadcasters would be free to choose the types of programs and what subjects and viewpoints would be presented. This option also recognizes the different conditions in different local markets. Broadcasters in larger markets may find it more reasonable to set aside an entire channel for public interest programming, while broadcasters in smaller markets may find it more reasonable to provide additional hours of public interest programming.

C. To Increase the Diversity of Voices on the Airwaves, Broadcasters Should Have the Option of Leasing a Portion of Their Spectrum to a Small Disadvantaged Business or Noncommercial Educational Programmer.

Instead of providing additional public interest programming, a DTV broadcaster engaged in multicasting could choose to lease a channel or certain number of hours to either a small disadvantaged business (SDB)[30] or a noncommercial educational (NCE) programmer. This option has great potential to serve the public interest by increasing diversity of programming and creating opportunities for minorities, women and others that have previously had few opportunities to participate in broadcasting. *See Advisory Committee Report* at 63-64.

Under this option, broadcasters would have two alternatives; they could: (1) lease an entire channel (outside the direct editorial control of the licensee) to an SDB or local/national producer of NCE programming; or (2) lease time by the hour to an SDB or local/national producer of NCE programming. The amount of time would be a percentage of the number of

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[30] The term SDB and the government program supporting it, is defined and discussed at *Small Disadvantaged Business- What We Do,* <http://www.sba.gov/sdb/section06c.htm> (last visited Mar. 20, 2000).

total hours of multicast programming.[31] Broadcasters would lease to an SDB or local/national producer at below market rates.

The option of leasing space to an independent voice furthers the fundamental First Amendment interest in promoting the "widest dissemination of information from diverse and antagonistic resources." *See Associated Press v. United States*, 325 U.S. 1, 20 (1945). Promoting diverse sources of information for the public is increasingly important in this era of unprecedented media market consolidation.[32] This option is a great opportunity to combat, at least partially, this wave of concentration by increasing the diversity of voices on the airwaves and the availability of NCE programming to the public. In addition, leasing spectrum to SDBs will promote service to under-represented segments of the community.

The leasing option also addresses the Commission's concern with the barriers to entry endemic to the broadcasting industry. *See NOI* at ¶ 29. Allowing broadcasters to lease a channel or portions of channels at reduced rates would be a good step toward alleviating the market entry and acquisition barriers that small, minority- and women-owned businesses face. Providing

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[31] For example, under this option, the Commission could require a licensee to lease one hour to an SDB for every 15 hours it multicasts. Another possibility would be that the licensee could craft various arrangements with several SDBs, leasing various spots to several voices. Still other possibilities may be found in community agreements, where the local community could enter into an arrangement with the broadcaster to lease certain portions of time as a platform for local talent.

[32] *See, e.g.*, Mark Leibovich, *Old, New Media Joining Forces*, WASH. POST, Jan. 11, 2000, at A1 (AOL-Time Warner merger); Stephen Labaton, *Wide Belief U.S. Will Let a Vast Deal Go Through*, N.Y. TIMES, Sept. 8, 1999 <http://www.nytimes.com/library/financial/090899cbs-viacom-regulate.html> (Viacom-CBS merger); David Lieberman, *Firms waiting to exhale as FCC reconsiders ownership rules*, USA TODAY, Mar. 20, 2000, at 4B <http://www.usatoday.com/usatonline/ 2000320/2049002s.htm> (Tribune-Times Mirror merger and AT&T-MediaOne merger).

opportunities for SDBs through leasing is particularly important in light of the fact that only incumbent broadcasters received spectrum for DTV.

The leasing option is also consistent with obligations imposed on other multichannel video providers. The ability to multicast enables digital broadcasters to become multichannel providers, similar to cable television and digital broadcast satellite operators. And these multichannel providers have been required to set aside channels for public interest programming. For example, cable operators are required to make available between ten and fifteen percent of their channels for lease to unaffiliated programmers. *See* 47 U.S.C. § 532(b)(1).[33] In addition, cable operators are required, at the request of the local franchising authority, to provide channels for public, educational and governmental access. *See* 47 U.S.C. § 531. DBS broadcasters are also required to set aside four percent of their capacity for NCE programming. *See* 47 U.S.C. § 335; Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, *Report and Order*, 13 FCC Rcd 23254, 23285 (1998). The rationale behind these requirements stems from Congress' belief that ensuring public access to all forms of electronic media is an important governmental goal. *See Time Warner v. FCC*, 93 F.3d 957, 976 (D.C. Cir. 1996). The same rationale for leasing space for public use on cable and DBS applies to multicasting digital broadcasters.

D. Broadcasters Should Have the Option of Paying a Fee to Support Local Noncommercial Educational Programming.

Under the third option, a DTV broadcaster could pay a fee into a fund to support local

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[33] The purpose of this leased access requirement is "to assure that the widest possible diversity of information sources are made available to the public." 47 U.S.C. § 532(a).

NCE programming in lieu of its additional public interest obligations. *See Advisory Committee Report* at 55. The fee could be equivalent to one percent of a licensee's total annual gross advertising revenues[34] or five percent of annual gross revenues derived from multicasting.[35] This "pay or play" option is an important component to promoting a flexible range of options for digital broadcasters. It furthers the important government interest of assuring that the public has access to diverse, quality noncommercial programming. *See Time Warner*, 93 F.3d at 976.

The pay option provides much needed funding for entities such as local PBS stations or other non-profit programmers, whose primary purpose is to provide programming meeting public needs rather than maximizing profits. It is a simple means of allowing a broadcaster to indirectly help provide more noncommercial programming to its community of service and thereby meet its enhanced public interest obligations.

The Communications Act grants the Commission a wide authority to regulate broadcasters in the public interest. Offering to a pay a fee as one of the many options a DTV

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[34] *Cf.* Henry Geller, *Implementation of "Pay" Models and the Existing Public Trustee Model*, in DIGITAL BROADCASTING AND THE PUBLIC INTEREST 227, at 229 (1998) (discussing a "pay/public broadcasting" regulatory model where a licensee would no longer have any public interest obligations and instead pay 2% of gross advertising revenues and 2% of sales transactions into a public broadcasting fund). The 1% suggestion above incorporates the fact that DTV broadcasters would still have to meet a basic minimum of public interest obligations.

[35] *Cf.* Fees for Ancillary or Supplementary Use of Digital Television Spectrum Pursuant to Section 336(e)(1) of the Telecommunications Act of 1996, *Report and Order*, 14 FCC Rcd 3259 (1998) (concluding that a fee of 5% of gross revenues of a digital licensees fee based ancillary services was reasonable and would not discourage DTV broadcasters from using the their new capacity to offer new services). Similarly, in this case a 5% fee based on the gross revenues a DTV licensee generates from all multicasting services - free or pay - would be a reasonable return to the public in lieu of public interest obligations and would not dissuade broadcasters from providing more program streams.

broadcaster may elect to serve its community lies well within that broad authority and is reasonably related to the regulation of the licensee as a public trustee. Since paying a fee is optional, the Commission would not be imposing a mandatory fee. Rather, the pay option simply gives broadcasters an alternate way to satisfy their enhanced public interest obligations to the public.

IV. EXISTING PUBLIC INTEREST OBLIGATIONS SECURING CANDIDATE'S ACCESS RIGHTS AND PROTECTING CHILDREN FROM EXCESSIVE ADVERTISING MUST APPLY TO ALL ANCILLARY AND SUPPLEMENTAL PROGRAM SERVICES.

Multicasting allows DTV broadcasters to provide ancillary programming services in addition to their free channel or channels. The NOI asks whether "a licensee's public interest obligations apply to its ancillary and supplemental services." *NOI* at ¶ 13. We agree with People for Better TV that "[t]he public interest standard attends to all DTV uses of the spectrum." PBTV Petition at 5. The plain language of 47 U.S.C. § 336 indicates that all program services, including ancillary and supplemental, must be in the public interest.[36] Section 336(d) explicitly states that a "television licensee shall establish that *all of its program services* on the existing or advanced spectrum are in the public interest." 47 U.S.C. § 336(d) (emphasis added). A broadcaster must serve the public interest on all of its program services, including ancillary and supplemental, or the clause "all of its program services" would have no meaning.[37] Thus, it is clear that existing public interest obligations apply to ancillary and supplemental program

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[36] Part V *infra*, will discuss how the public interest standard applies to non-programming ancillary services such as datacasting.

[37] *See also* 47 U.S.C. §§ 336(a)(2).

services, as well as free-over-the-air services.

As discussed below, the existing public interest obligations concerning candidate access rights and children's advertising limits must be applied to all programming services, whether free or pay.[38] Failure to apply these obligations to ancillary program services would frustrate the underlying goals of these fundamental obligations.

A. DTV Broadcasters Must Comply with the Statutory Mandates of Equal Opportunities and Reasonable Access on All Program Services.

The NOI asks how a broadcaster's obligations to provide equal opportunities and reasonable access to candidates translates into the digital environment. *See NOI* at ¶ 11. Simply put, these rules should apply across the board to all program services. Any other interpretation of the statutory mandates of candidate access rights would conflict with the letter of the law and the Commission's implementing rules and precedent.

1. The FCC should clarify that Section 315(a) of the Communications Act requires digital licensees to provide equal opportunities to all political candidates on all program services.

Section 315(a) of the Communications Act requires a broadcaster that permits any political candidate to use its facilities to provide equal opportunities to all other such candidates for that office. 47 U.S.C. § 315(a). "The basic purpose of section 315(a) is to permit the 'full and unrestricted discussion of political issues by legally qualified candidates.'" *Becker v. FCC*, 95 F.3d 75, 82 (D.C. Cir. 1996) (citing *Farmers Educ. & Coop. Union of Am. v. WDAY, Inc.*, 360

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[38] Closed caption requirements must also be met on all program services. The application of existing closed captioning requirements to ancillary programming services, as well as recommendations concerning access for non-programming ancillary services, is discussed *infra* at Part V.C.

U.S. 525, 529 (1959)). Section 315(a) "[p]revent[s] discrimination between competing candidates by broadcasting stations and cable operators." *The Law of Political Broadcasting and Cablecasting: A Political Primer*, 69 F.C.C. 2d 2209, 2216 (1978) ("*Political Primer 1978*"). Under the Commission's rules, equal opportunities means that a broadcaster must "make available periods of approximately equal audience potential to competing candidates to the extent that is possible." *Political Primer 1984*, 100 F.C.C. 2d 1476, 1505 (1984).

Thus, any use by a candidate of any program service provided by a DTV broadcaster triggers a competing candidate's rights, and the licensee must then provide any competing candidate for that office an equal opportunity to use that service. A contrary application of the statute would allow broadcasters to discriminate among candidates for the same office. For example, if a broadcaster provides candidate A with the use of its "primary" channel, it must follow suit with candidate B. The digital licensee cannot delegate candidate B to a different channel. This would constitute illegal discrimination toward candidate B under section 315. *Cf. Becker*, 95 F.3d at 84 (discussing how if a licensee channels one candidate's message to "prime time" and the second candidate to "broadcasting Siberia," the latter would be denied the equal opportunity guaranteed by section 315). The same rationale applies if the broadcaster provides access to candidate A on the licensee's ancillary pay program service. To comply with section 315, the digital broadcaster must provide candidate B with an equal opportunity on its pay channel.

In addition, "the power to channel" not only confers "on the licensee the power to discriminate between candidates, it can force one of them to back away from what he considers to be the most effective way of presenting his position on a controversial issue lest he be

deprived of the audience he is most anxious to reach." *Becker*, 95 F.3d at 83. This danger is even greater in the digital environment where a broadcaster now has an array of program streams to channel a candidate's message. Thus, it is imperative that the Commission require all digital licensees to offer equal opportunities to all candidates on all their program services.[39]

2. The FCC should clarify that Section 312(a)(7) of the Communications Act requires digital licensees to provide candidates reasonable access to all program services.

The Commission must also clarify how § 312(a)(7) of the Communications Act applies to DTV. Under § 312(a)(7), broadcasters are required to provide federal candidates with "reasonable access" to their facilities during political campaigns. The purpose of this law is to ensure that "candidates for Federal elective office are given or sold reasonable amounts of time for their campaigns." *Political Primer 1978* at 2216. The Commission has set forth several general principles that seek to clarify what is considered reasonable. *See* Commission Policy in Enforcing Section 312(a)(7) of the Communications Act, *Report and Order*, 68 F.C.C. 2d 1079 (1978) ("*Report and Order on 312(a)(7)*"). For example, a "licensee may not adopt a policy that flatly bans Federal Candidates from access to the types, lengths and classes of time which they sell to commercial advertisers." *Id.* at 1094; *see also CBS v. FCC*, 453 U.S. 367, 382 (1981) (describing the Commission's "rule of reason" with respect to bans on candidate advertising).[40]

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[39] "It was the intent of Congress to insure complete freedom of expression by political candidates, and therefore the no-censorship provision of Section 315 prohibits *any interference, direct or indirect, with such expression.*" *D. J. Leary*, 37 F.C.C. 2d 576, 578 (1972) (emphasis added).

[40] It is also impermissible for a licensee to refuse "to sell or give prime-time programming to legally qualified candidates." Licensee Responsibility under Amendments to the Communications Act Made by the Federal Election Campaign Act of 1971, 47 F.C.C. 2d 516,

Consistent with these principles, a DTV licensee must grant federal candidates reasonable access to all of its program services, including ancillary or supplemental. Similarly, the Commission cannot allow DTV broadcasters to segregate candidate-centered programming to a lesser viewed program stream. Candidates "target specific voting groups with television advertisements." *Becker*, 95 F.3d at 80 (citations omitted). A digital licensee who refuses to sell or give time to a candidate on its ancillary pay service or agrees to sell time to a candidate only on the licensee's less popular channels impermissibly interferes with the candidate's campaign strategy. Such a practice is unreasonable and hence unlawful under § 312(a)(7). *See Becker*, 95 F.3d at 80 (citing *CBS*, 453 U.S. at 389).

The Commission should also require digital licensees to provide reasonable access to local and state candidates. The reasonable access requirement "does not exempt stations from making time available to candidates for non-Federal offices." *Political Primer 1978* at 2286. Licensees have a duty inherent in their obligation to serve the public interest to present local political issues. *See Report and Order on 312(a)(7)*, 68 FCC Rcd at 1087-1088. The presentation of political broadcasting concerning local affairs is "vital to the proper functioning of our Republic." *Licensee Responsibility as to Political Broadcasting*, 15 F.C.C. 2d 94, 94 (1968). This existing obligation continues into the transition to digital. But in light of DTV's new capabilities, the Commission should go one step further. In the analog era, broadcasters argued that it was impractical to require a broadcaster to provide access for all local candidates because it was difficult to accommodate a large number of candidates on a single channel.

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516 (1974).

However, since DTV allows broadcasters to transmit more than one channel, this problem can be alleviated. With the extra room, DTV broadcasters now have the space to accommodate state and local candidates and the Commission should require them to do so.

At minimum, the Commission should extend its "rule of reason" prohibiting bans on sales to federal candidates to encompass state and local campaigns. The Commission should adopt the recommendation of the Advisory Committee that the "FCC should prohibit broadcasters from adopting blanket bans on the sale of time extended to all State and local political candidates." *Advisory Committee Report* at 60; *see also NOI* at ¶ 38. As discussed above, broadcasters have a responsibility to inform their communities on issues of local political importance. For a broadcaster to ban all local candidates from advocating their candidacy on its airwaves is patently unreasonable and in violation of this duty.

B. DTV Broadcasters Must Comply with the Commission's Rules Protecting Children from Excessive and Unfair Advertising on All Program Services.

The Commission asks how the policies set forth in the Children's Television Policy Statement should be applied in the digital environment. *See NOI* at ¶ 12. The Children's Television Act of 1990 and implementing regulations and policies concerning children's advertising limits, host-selling and program length commercials must be applied to all program services. Policies such as commercial advertising limits were instituted to protect children while watching television. It makes no difference to a child whether the program she is watching is analog or digital, free or pay. Unfair commercial practices can have the same harmful effects, regardless of the platform. The crucial issue is not what channel the programming is on, but whether it is aimed at children. And if it is aimed at children, then it must be subject to the rules

pertaining to children's broadcasting, whether it is on a free or ancillary or supplemental program service. These issues are discussed more fully in CME *et al.*'s Comments.

V. THE COMMISSION SHOULD REQUIRE DTV LICENSEES THAT PROVIDE ANCILLARY AND SUPPLEMENTARY SERVICES TO SATISFY PUBLIC INTEREST OBLIGATIONS ON THOSE SERVICES.

As discussed above, a digital broadcaster must meet certain existing public interest requirements on its ancillary and supplementary program services, *i.e.*, pay services. The NOI also asks whether public interest obligations attach to non-programming ancillary and supplemental services. *See NOI* at ¶ 13. Section 336(a)(2) explicitly directs the Commission "to adopt regulations that allow holders of [DTV] licenses to offer such ancillary and supplemental services . . . as may be consistent with the public interest, convenience, and necessity." 47 U.S.C. § 336(a)(2).[41] So the question is not whether ancillary and supplemental services should serve the public interest, but how.

In this section, UCC *et al.* address the public interest obligations that should apply to DTV broadcasters that use the spectrum to provide non-programming ancillary services, such as datacasting. Digital broadcasters could meet their public interest obligations by providing a certain amount of datacasting services to local schools and libraries and non-profit community organizations. The Commission should also explore the possibility of allowing digital licensees to meet their public interest obligations on ancillary services by providing broadband Internet access to needy schools, libraries, and/or community centers. In addition, the Commission must

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[41] In addition, section 336(b)(5) directs the FCC to prescribe regulations for ancillary or supplemental services including "such *other* regulations as may be necessary for the protection of the public interest, convenience, and necessity." 47 U.S.C. § 336(b)(5)(emphasis added).

ensure that all ancillary and supplemental services, programming and non-programming, are accessible to the disabled.

A. DTV Licensees Should Be Required to Set Aside a Minimum Portion of Their Spectrum to Transmit Data on Behalf of Local Public Interest Organizations.

The NOI asks how datacasting could count toward a digital broadcaster's public interest obligations. *See NOI* at ¶ 13. Specifically, the Commission asks about the Advisory Committee's proposal that broadcasters choosing to datacast should transmit information on behalf of local schools, libraries, community-based organizations, governmental bodies, and public safety institutions. *See Advisory Committee Report* at 49.

The ability of digital broadcasters to datacast information over the digital spectrum creates enormous potential for broadcasters to better serve their communities. *See Advisory Committee Report* at 53. For example, with less than one percent of the digital spectrum, broadcasters are able to transmit data regarding weather, public safety and health, governmental activities, and educational programming, to name a few. *See id.* Because of this vast potential to serve the public interest, the Advisory Committee recommends that broadcasters work with local educational and public safety institutions to provide community datacasting services. *See id.* UCC *et al.* support the Advisory Committee's recommendations.

B. The Commission Should Explore the Possibility of Allowing DTV Licensees to Satisfy a Portion of their Public Interest Obligations by Providing Broadband Internet Access to Needy Schools, Libraries and/or Community Centers.

In addition to one-way datacasting, recent studies and articles indicate that digital broadcasters may be able to use the additional spectrum to link up Internet Service Providers

(ISPs) and provide wireless Internet connections of some fashion.[42] This link will permit digital broadcasters to fully integrate into the Internet infrastructure, offering the Internet through the television set. *See* Ducey, *supra* note 3. Digital broadcasters will be able to reap additional profits from expanding to wireless communications, getting far more use and economic value out of the digital technology than they first anticipated. *See id.*

The possible capability of a digital broadcaster to use the spectrum as a digital "pipe" raises other potential ways that a licensee can serve its community. For example, there is the possibility that a DTV broadcaster could help bridge the digital divide in its community by providing broadband Internet access to local schools, libraries and community centers. UCC *et al.* recommend that to the extent that some broadcasters do actually use their digital capacity to provide some form of broadband Internet access, the Commission should apply open access, non-discriminatory principles to these services. UCC *et al.* urge the Commission to explore all the opportunities that lie in DTV's datacasting capabilities to better serve the public interest.

C. The Commission Should Ensure that All Ancillary and Supplemental Programming and Non-Programming Services Are Accessible to Persons with Disabilities.

The NOI asks what could be done to make all ancillary and supplemental services accessible to individuals with disabilities. *See NOI* at ¶ 28. First, it is clear that if the ancillary or supplemental service is a program service, *e.g.*, pay channel, the existing captioning rules apply. *See* discussion *supra*, Part IV. As the Commission has previously stated, the video programming accessibility requirements "apply to *all* types of video programming delivered

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[42]*See* Ducey, *supra* note 3; Dickson, *supra* note 4; Healey, *supra* note 4.

electronically to consumers, regardless of the entity that provides the programming or the category of programming." *Video Programming Order,* 13 FCC Rcd at 3276. (emphasis added) A DTV broadcaster who multicasts becomes a multichannel video programming distributor ("MVPD"). As an MVPD, a DTV broadcaster is required to meet closed captioning requirements for all types of programming services it offers, whether free or pay. *See id.*; 47 C.F.R. § 79.1(b).

Second, with respect to non-programming ancillary or supplemental service, UCC *et al.* agree with the Advisory Committee's recommendation that the Commission should explore ways of expanding disability access to any new service that digital licensees provide through the digital bandwidth. *See Advisory Committee Report* at 62. In addition, the Commission should ensure that ancillary services do not impinge on the bandwidth currently set aside for closed captioning.

VI. THE COMMISSION SHOULD ESTABLISH BASIC SAFEGUARDS TO PROTECT CONSUMER PRIVACY FROM THE POTENTIAL INVASIVE AND ABUSIVE MARKETING PRACTICES IN DIGITAL TELEVISION.

The Commission should also guard against the potential of DTV to be used in ways contrary to the public interest. On the one hand, the interactive capabilities of DTV have tremendous potential to enhance educational and public affairs programming. Enhanced television allows educational programmers to "combine the storytelling power of video and film with the enormous data channel of a digital television signal." PBS Digital Television - Enhanced Programming Shockwave Demo, <http://www.pbs.org/digitaltv/enhanceNS.html> (last visited Mar. 15, 2000). A DTV broadcaster could enrich televised political debates or city council meetings by permitting the audience to directly interact with the candidates or officers.

However, the interactive potential of DTV also raises serious questions concerning consumer privacy. To protect consumer privacy, the Commission should adopt a rule that prevents DTV broadcasters from collecting personal information unless the consumer "opts-in" to the scheme after adequate notice.

A. Interactive DTV Poses a Serious Threat to Privacy.

DTV allows broadcasters to gather unprecedented amounts of personal information about people, including viewing and purchasing habits, and use that information to target advertisements to the consumer.[43] The DTV set top box can be assigned a number that allows the broadcaster, or third party, "to determine what is watched on the set, when, and for how long." Horn, *supra* note 42. The technology also allows the broadcaster to "gather data on how long [a viewer] spend[s] on which show, whether they link from the TV show to a Web Site, and even what they click on at the site." *Id.* Further, interactive technology allows for the collection of detailed personal data.[44]

Interactivity allows broadcasters to not only better target advertisements, but to make it possible for veiwers to directly purchase the advertised product.[45] Experimentation with

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[43]*See* Bob Van Orden, *Top Five Interactive Digital-TV Applications*, Multichannel News, No.25, Vol.20, pg. 143 (June 21, 1999); Patricia Horn, *Interactive TV Making Strides; Ability to Gather Data Spurs Privacy Worries*, ARIZONA REPUBLIC, at D3 (Jan. 24, 2000).

[44]For example, during an advertisement for shampoo, viewers could be invited to press a button on their remote control which then takes them to an " interactive area . . . where they are asked about the color and thickness of their hair, and how often they wash it." David Pringle, *Interactive Media Change Rules of Broadcasting*, WALL ST J. EUR. 12 (Dec. 7, 1999); *accord* Marketing Week, *P&G to Test Interactive TV ads with C&W*, at 12 (Feb. 24, 2000).

[45]*See* Mark Cooper, *A Consumer Perspective on Economic, Social and Public Policy Issues in the Transition to Digital Television*, Report of CFA to People for Better TV (Oct. 29, 1999),

"impulse" buys like pizza is already bearing fruit.[46] According to some analysts, the combination of collecting information and using it to target ads to viewers "may prove to be the biggest money spinner of all-targeted advertising."[47]

The efficiency of such a targeting system is revolutionary for the advertising and mass media industries.[48] "The ability to respond with a remote control . . . is forecasted to drive the direct marketing industry to $30.8 billion by 2005." Morgan Stanley Dean Witter, *Digital Decade,* at 3 (Apr. 6, 1999). From a marketer's perspective, the combination of television and the Internet is a "marriage made in heaven."[49]

From the consumer's perspective, however, this ability to collect and utilize personal information is frightening. The public has already expressed grave concerns about the collection of personal information on the Internet.[50] These same concerns apply with greater force to

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available at < http://www.bettertv.org/consumerperspective.htm> (discussing, *inter alia*, the ability of interactive DTV exploiting "impulse" oriented advertising at the expense of the consumer); Market Week, *Interactive TV to Encourage Impulse Buying*, at 20 (Jan. 13, 2000).

[46]*See* Robin Berger, *B3TV pays for Slice of e-pie*, ELECTRONIC MEDIA, at 14 (Aug. 30, 1999).

[47]*Id.* For example, "when the World Cup finals finishes imagine the potential of an on screen advert selling the official ball of the tournament . . . [i]t could be bought at the touch of a button." Martin Sims, *From Aiming too High to Aiming Too Low*, INTERMEDIA at 5 (June 1999).

[48] *See* Van Orden, *supra* note 42, at 145 ("[i]magine an electronic 'direct mail on steroids,' where advertising is matched so precisely to the profiles of likely purchasers that response rates routinely exceed 20 percent.").

[49] Publishing Technology Review, *TV Online Faces an Uphill Battle for those Eyeballs* (May 1, 1998).

[50] *See* Major R. Ken Pippin, *Consumer Privacy on the Internet: It's "Surfer Beware,"* 47 A.F. L. REV. 125 (1999); Electronic Privacy Information Center, *Privacy Surveys,*<http://www.epic.org/ privacy/ survey/html.> (last visited Mar. 26, 2000).

interactive DTV.

B. To Protect Consumer Privacy, the Commission Should Adopt a Rule Preventing DTV Broadcasters from Collecting Personal Information Unless the Consumers "Opt-in" after Adequate Notice.

In light of the amount of money at stake,[51] and the dangers to consumer privacy, it is imperative that the Commission act before the market fails to protect the privacy interests of consumers. The Commission should adopt rules to prevent broadcasters from using the interactive capabilities of DTV to violate consumer privacy.[52]

UCC *et al.* urge the Commission to adopt a DTV privacy policy that tracks the privacy protections cable operators must afford to subscribers. *See* 47 U.S.C. § 551. Cable operators must provide all subscribers with clear notice describing what personally identifiable information might be collected, how it may be disclosed, how long the operator retains the information, and where the subscriber may have access to such information if collected. 47 U.S.C. § 551(a)(1)(A)-(D). A cable operator is prohibited from collecting personally identifiable data without the subscriber's prior consent. 47 U.S.C. § 551(b)(1). Lastly, a subscriber has a right to access the data collected by the cable operator as well as the right to correct any erroneous information. 47 U.S.C. § 551(d).

There is no reason why consumers should have less privacy protection on digital

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[51] *Cf.* Joel R. Reidenberg, *Restoring Americans' Privacy in Electronic Commerce*, 14 BERKELEY TECH. L.J. 770, 775 (1999) ("[b]y 1998, the gross annual revenue of companies selling personal information and profiles, largely without the knowledge or consent of individuals concerned, was reportedly $1.5 billion").

[52] Special safeguards are needed to protect children from invasions of privacy and excessive and abusive advertising practices. To this end, UCC *et al.* endorse the proposals of CME *et al.*

television than on cable. The Commission should adopt similar rules to prevent DTV broadcasters from collecting consumers' viewing and purchasing habits without consumer consent. Consumer consent should only be valid after the digital licensee has given clear and understandable notice of what information is being collected and how it will be used. Similar to the cable protections, the Commission should pass regulations that give consumers the right to access data collected by the DTV licensee and the right to correct any erroneous information. The above four requirements - notice, consent, access, enforcement, and correction - are not only consistent with the privacy protection enjoyed by cable subscribers, but are consonant with general privacy principles applicable to all forms of consumer data collection.[53]

Moreover, a meaningful consumer interactive privacy regulation is good policy for business, as well as consumers. Consumers wary of compromising their privacy rights every time they turn on the television may simply turn their attention elsewhere. Protecting consumer privacy is good for the market because it increases consumer confidence.[54] The Commission also has the authority to adopt consumer privacy safeguards under its traditional statutory duty to ensure that broadcasters fulfill their roles as public trustees and act in the public interest. Indeed, § 336(b)(5) explicitly grants the Commission the authority to "prescribe *such other regulations*

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[53] *See* Pippin, *supra* note 50, at 128-29 (discussing general consumer privacy principles in the context of data collection over the Internet). *See also* Sherman Fridman, *California Senator Proposes Interactive TV Privacy Legislation,* NEWSBYTES (Feb. 22, 2000) (discussing how proposed opt-in regulation of interactive DTV would be very similar to state and federal laws prohibiting video stores and libraries from sharing or selling customer information with third parties without first getting written consent from the customer); 47 U.S.C. § 222 (privacy requirements for telecommunications carriers).

[54] *See* Reidenberg, *supra* note 51, at 772 (discussing how fair privacy regulations are necessary conditions for the market to gain sufficient consumer confidence).

as may be necessary for the protection of the public interest, convenience and necessity." 47 U.S.C. § 336(b)(5) (emphasis added). It is beyond reproach that consumers have a right to protect personal information. Digital broadcasters licensed to serve the "public interest, convenience and necessity" must abide by that right and the Commission should enforce it.

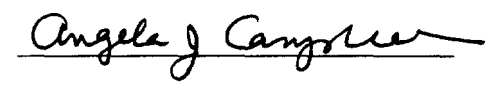
CONCLUSION

Both the Communications Act and good public policy demand that digital broadcasters meet public interest obligations on all of their services. The present public interest obligations, which were developed at a time when each licensee could broadcast only on a single, analog channel, are insufficient for the future. Enough is known about how broadcasters will use the expanded capacity and capabilities of digital to establish both mandatory minimum public interest requirements and additional public interests requirements that would vary depending upon community needs and how the spectrum is used. Adopting public interest requirements now will both provide helpful guidance to broadcasters in developing new services and ensure that the public benefits from the transition to DTV.

Thus, the Commission should issue an NPRM on the public interest obligations of digital licensees as soon as possible, but no later than August 2000. As described above, the NPRM should include five elements. First, it should set forth minimum public interest requirements for all licensees that include: 1) specific quantities of local affairs programming; 2) free time for political candidates; 3) children's educational programming; 4) expanded closed captioning and video description requirements; and 5) strengthened EEO outreach and reporting. Broadcasters should have to publicly document their compliance with these minimum requirements. Second, the NPRM should propose additional, flexible public interest obligations for digital broadcasters

choosing to multicast. Third, the Commission should clarify how equal opportunities and reasonable access requirements for political candidates and advertising protections for children apply to all DTV program streams. Fourth, the Commission should adopt rules ensuring that ancillary and supplementary services, such as datacasting and Internet access, are used to benefit the public and are accessible to people with disabilities. Finally, the Commission should take action to ensure that broadcasters do not use DTV's interactive capabilities to invade consumer privacy.

Respectfully submitted,



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